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No. 08-251

Supreme Court, U.S.
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In The

Supreme Court of the United States

ROBERT R. LONG AND KELLY L. LONG,

Petitioners,

v.

JIMMIE RAY SLATON, JR. AND RONNIE WILLIS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

(i) Course of Proceedings Below

Petitioners filed their Complaint in this matter on May 25, 2006, pursuant to 42 U.S.C. §1983 seeking damages against Respondents Ronnie Willis and Jimmie Ray Slaton, Jr. Count One of the Complaint alleges that the actions of Deputy Slaton "violated the civil rights of the decedent Bryan Long guaranteed to him under the United States Constitution and Federal Statutes." Similarly, Count Two of the Complaint contends that the actions of Sheriff Willis "violated the civil rights of the decedent Bryan Long guaranteed to him under the United States Constitution and Federal Statutes."

In their Motion to Dismiss, the Respondents argued that the Petitioners' claims were due to be dismissed on qualified immunity grounds. Respondents fully discussed these grounds in their Memorandum Brief in Support of their Motion to Dismiss. On June 26, 2006, the District Court set a briefing schedule giving the Plaintiffs-Appellees fourteen (14) days in which to respond to Respondents' Motion to Dismiss and Memorandum Brief. On July 10, 2006, the Petitioners filed a Response in Opposition to the Motion to Dismiss. The following day, the District Court summarily denied the Respondents' Motion to Dismiss. The entire text of the Order provides:

> Pending before the court is defendants Lauderdale County Sheriff Ronnie Willis and Deputy Sheriff Jimmie Slaton, Jr.'s motion to

> dismiss (doc. 7), and the court having considered said motion, brief in support (doc. 8), and the plaintiffs' brief in opposition (doc. 10), and the court being of the opinion that the motion to dismiss is due to be denied,
>
> It is therefore ORDERED that said motion is DENIED.

On August 10, 2006, the Respondents filed a timely Notice of Interlocutory Appeal. On November 16, 2007, the Eleventh Circuit reversed the District Court's denial of Respondents' Motion to Dismiss. *Long v. Slaton*, 508 F.3d 576 (11th Cir.2007). On May 27, 2008, Petitioners filed an Application for Rehearing *En Banc*, which the Eleventh Circuit denied, and on August 25, 2008, Petitioners filed this Petition for Writ of Certiorari.

(ii) Statement of Facts

Pursuant to the appropriate standard of review, all non-conclusory facts contained in the Complaint were assumed true by the Eleventh Circuit:

> The complaint alleges these facts. In May 2005, Long's father, a medical doctor, went to the Lauderdale County Probate Court seeking to have Long committed to a hospital because Long was suffering from a "psychotic episode."[1] But Long's father was unable to

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[1] To be committed in the State of Alabama, one must be "mentally ill"; must "pose[ ] a real and present threat of substantial

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have Long committed because of a lack of available hospital beds. While returning to his residence,[2] Long's father called the Lauderdale County Sheriff's Department and requested assistance due to Long's psychosis.[3] Upon arrival at his home, Long's father waited in his vehicle for help to arrive.

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harm to himself or others"; and, "the danger posed by the person to be committed has been evidenced by a recent overt act." *Lynch v. Baxley*, 386 F.Supp. 378 (M.D.Ala. 1974). *See also*, ALA. CODE §22-52-10.4(a). Accordingly, the Petitioners concede that Bryan Long not only "pose[d] a real and present threat of harm to himself or others," but also concede that the danger he posed was "evidenced by a recent overt act." *Id.*

[2] Although the Petitioners devote a substantial portion of their statement of facts to the layout of their home, and argue that Bryan Long was "backing away from the officer in a vehicle on a gravel driveway in a *rural, isolated area* with one egress to a country road" (Pet. Brief, pp.3, 10-11), such rhetorical flourish was neither alleged in the Complaint, nor did the Eleventh Circuit find it relevant to the inquiry. As the Eleventh Circuit noted, "[t]he complaint states that the Long residence is located on the outskirts of Florence, Alabama, on an 18-acre lot. The nearest neighbor is about half a mile away. The property's 250-foot driveway connects to a county road." *Long*, 508 F.3d at 578 n.2. Of course, a half-mile is a very short distance to travel in a performance-enhanced police cruiser, which could travel from the outskirts of a city to a densely populated area in a very short time.

[3] Petitioners contend that Bryan Long was a "'fleeing, unarmed, previously non-violent, mentally ill suspect" (Pet. Brief, p.10), but this description of Long is contradicted by the allegations of the Complaint. Long was "unarmed" only if one discounts the fact that he was driving a thirty-five hundred pound, performance-enhanced police cruiser, and ignores the abundant statutory and case law authority describing vehicles

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Deputy Slaton responded to the call and arrived at the Long residence shortly thereafter. Slaton, who was alone, got out of his marked sheriff's cruiser,[4] leaving the keys

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as potential deadly weapons. Further, while Dr. Long may have told Slaton that his son had not been physically violent towards him that day, his description of his son's psychotic state (which by definition implies a real and present threat), Dr. Long's own behavior (remaining tucked safely away in his vehicle until Slaton arrived), and the extreme behavior exhibited by Bryan Long in Deputy Slaton's presence were contrary to the notion that his son posed no threat of harm.

[4] The Eleventh Circuit noted:

> Plaintiff's complaint refers to Deputy Slaton's vehicle as a "cruiser." The word "cruiser" is defined as "a police-car that patrols the streets," from which we infer that Deputy Slaton's vehicle was a marked sheriff's patrol vehicle. *See* 4 Oxford English Dictionary 80 (2d ed.1989) (1928). Although we rely on the ordinary meaning of the term "cruiser" as a marked police patrol vehicle, this fact (which no one has disputed) is directly supported by an investigative report from the Alabama Bureau of Investigation, which Plaintiffs submitted to the district court as an attachment to Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss. The report indicates that the vehicle was a marked sheriff's cruiser complete with county tags, a flashing light bar on the roof, two police radios, and other emergency equipment. At the 12(b)(6) stage, we "primarily consider the allegations in the complaint," but "[t]he court is not [always] limited to the four corners of the complaint." 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure §1357 at 376-77 (3d ed.2004). Because Plaintiffs submitted the investigative report in opposing Defendants' motion to dismiss and because the document's authenticity and veracity are in this case unchallenged, we look

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in the ignition and the driver's door open. Slaton then spoke to Long's father, who explained his desire that Long be detained due to Long's psychosis. When Deputy Slaton asked Long's father if Long had been physically violent with him, the father responded, "no."

Deputy Slaton then approached Long, who was at the end of the driveway, close to the house. Slaton pulled out handcuffs and told Long that Slaton would take Long to jail. Long voiced his disagreement and then ran over to and got inside Slaton's cruiser and closed the door. Slaton then ran to the driver's side of the cruiser, pointed his pistol at Long, and ordered Long to get out of the cruiser. Deputy Slaton threatened to shoot Long if Long did not comply. Long then shifted the cruiser into reverse and began backing away and down the driveway toward the road. Slaton stepped into the middle of the driveway and fired three shots at Long as the sheriff's cruiser moved away. One shot went through the windshield and struck Long in the chest. The cruiser stopped as it rolled into an embankment, and Long died after about a minute. At the time, backup law enforcement was en route.

Long, 508 F.3d at 578-79 (footnotes omitted).

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to the report to confirm that the ordinary meaning of "cruiser" applies as an undisputed fact for Deputy Slaton's sheriff's cruiser.

Long, 508 F.3d at 578 n.3.

(iii) Standard of Review

This Court has recently confirmed that the pleading standard for purposes of a motion to dismiss requires factual allegations that support a plausible claim, rather than bald legal conclusions.[5] *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007) ("*Factual allegations must be enough to raise a right to relief above the speculative level....* So, when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, "'this basic deficiency should...be exposed at the point of minimum expenditure of time and money by the parties and the court'") (internal citations omitted) (emphasis added). The Eleventh Circuit has adopted *Bell Atlantic* as the standard by which motions to dismiss are to be analyzed. *Financial Sec. Assur., Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1282 (11th Cir.2007) ("In order for the plaintiff to satisfy his 'obligation to provide the grounds of his entitlement to relief,' he must allege more than 'labels and conclusions'; his complaint must include '[f]actual allegations [adequate] to raise a right to relief above the speculative level.'") [ ] Stated differently, *the factual allegations in a complaint must 'possess enough heft' to set forth 'a plausible entitlement to relief'* ") (emphasis added).

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[5] In *Bell Atlantic*, this Court abrogated the "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" standard of review established in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Additionally, this Court reviews the district court's denial of qualified immunity *de novo*, applying the same legal standards which should have been applied by the district court. The United States Supreme Court set out this Court's standard of review in *Mitchell v. Forsyth*:

> An appellate court reviewing denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's actions actually state a claim. All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged conditions or, in cases where the district court has denied summary judgment for the defendant on the ground that even under the defendant's version of the facts, the defendant's conduct violated clearly established law, whether the law clearly proscribed the actions the defendant claims he took.

472 U.S. at 528 (1985). "Appellate review of qualified immunity dispositions is to be conducted in light of all relevant precedents, not simply those cited to or discovered by the district court." *Elder v. Holloway*, 510 U.S. 510, 516, 114 S.Ct. 1019, 1023 (1994). *See also*, *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (*per curiam*) (granting qualified immunity at motion to dismiss stage, and observing, "we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation").

SUMMARY OF THE REASONS TO DENY THE PETITION

The Petitioners' request that this Court issue a Writ of Certiorari to the Eleventh Circuit is due to be denied. First, the Petition is premised on a distinction between the use of deadly force to prevent the risk of "potential danger" to the officer or others and the use of deadly force to prevent the risk of "immediate danger." This distinction is based solely in semantics and creates a false dichotomy. Any *risk* of danger, immediate or otherwise, is a *potential* danger, in that it has not yet occurred. Further, this distinction presumes that a "potential danger" is mutually exclusive of an "immediate danger." Of course, this reasoning is not sound; one can easily imagine a risk of "potential danger" that is, nevertheless, immediate.

The Petitioners, additionally, contend that the Eleventh Circuit's conclusion that Deputy Slaton's use of force was objectively reasonable in light of the circumstances he confronted is contrary to this Court's clearly established law. Ironically, the Eleventh Circuit relied on the very cases the Petitioners contend conflict with its holding. Alternatively, the Petitioners assert that the Eleventh Circuit's decision conflicts with its own clearly established law. These arguments, however, ignore this Court's admonition in *Brousseau v. Haugen* that Fourth Amendment excessive force jurisprudence is an "area [of law] in which the result depends very much on the facts of each case." 543 U.S. 194, 201 (2004) (*per curiam*). Because the cases cited by Petitioners are governed

by the factual circumstances confronted by the officer, as are all Fourth Amendment excessive force cases, none of these cases conflicts with the Eleventh Circuit's holding, here.

Similarly, the so-called Circuit split that the Petitioners advance to justify this Court's review is a red herring. The cases cited by the Petitioners from the Third, Sixth, and Seventh Circuits are readily distinguishable on the factual circumstances faced by the officers, if not on the very basis of their holdings. Additionally, none of these cases addresses the distinction between "potential danger" and "immediate danger" that is the crux of the Petitioners' arguments. These cases merely present divergent results based on the application of *the same law* to vastly different facts, which cannot, alone, create a Circuit split.

Obviously the death of the Petitioners' son was a tragedy for everyone involved, especially the Longs. But it was a tragedy necessitated by the extreme behavior exhibited by Bryan Long, not by any misconduct on the part of Deputy Slaton. Unfortunately, Deputy Slaton was confronted by what was a remarkably unique scenario that day in May of 2005: a young man experiencing a "psychotic episode" and who, according to his father, a doctor, "pose[d] a real and present threat of harm to [him]self and/or others" as "evidenced by a recent overt act," not only refused to be taken into custody, but chose to commandeer an arresting officer's fully equipped, performance-enhanced police cruiser and began to drive away, ignoring direct order to get out of the cruiser under

threat of being shot. Although reasonable officers could disagree as to the *preferred* response under these circumstances, no reasonable officer could deny that Long's actions created a dangerous situation that had to be addressed in a split-second and under tremendous pressure. Consequently, this case presents exactly the kind of scenario where responding officers are afforded the benefit of doubt under Fourth Amendment use-of-force jurisprudence, and the Eleventh Circuit properly granted Deputy Slaton qualified immunity.

REASONS TO DENY THE PETITION

I. NO PRECEDENT CLEARLY ESTABLISHES THAT DEPUTY SLATON'S USE OF FORCE WAS UNCONSTITUTIONAL.

A. Petitioners have created a false dichotomy between a risk of "potential danger" and a risk of "immediate danger."

Petitioners have misconstrued the state of the law regarding an officer's use of force to prevent a fleeing suspect from escaping when that suspect presents a risk of harm to the officer or others. Petitioners focus on the semantic difference between the risk of "potential danger" and the risk of "immediate danger." Of course, any risk of danger is "potential," in that it has not yet occurred. However, the Petitioners contend that, because the Eleventh Circuit recognized that Bryan Long posed a risk of "'potential danger'...as a mentally-unstable suspect in control of

a police vehicle," the Court did not find that Bryan Long posed any risk of "immediate danger." (Pet. Brief, p.8.) Accordingly, Petitioners argue, the Eleventh Circuit's decision conflicts with precedent of this Court and the Eleventh Circuit, particularly, *Scott v. Harris*, 127 S.Ct. 1769 (2007), and *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694 (1985). However, no precedent from this Court, or from the Eleventh Circuit, suggests that Deputy Long should have waited until the risk of potential danger posed by a mentally-unstable suspect in control of a police vehicle was more immediate.

Neither *Scott* nor *Garner* requires that the risk of potential danger to an officer or others be somehow more "immediate" than the risk posed by a psychotic suspect in control of a performance-enhanced police cruiser.[6] In fact, the Petitioners' cursory treatment of *Scott* overlooks its ultimate holding. (Pet. Brief, p.7, discussing *Scott* in a parenthetical.) In *Scott*, this Court reversed the Eleventh Circuit's denial of qualified immunity to an officer who used deadly force to prevent the escape of a fleeing suspect. 127 S.Ct. 1769. There, this Court recognized as the seminal issue to the Fourth Amendment inquiry, the "risk of bodily harm that Scott's actions posed to respondent *in light of the threat to the public* that Scott was

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[6] This Court is well aware, from the video in *Scott*, of the capacity that a police cruiser has for traveling substantial distances in short periods of time at high rates of speed and performing dangerous maneuvers. *See Scott*, at 1773.

trying to eliminate." *Id.* at 1778 (emphasis added). In balancing these risks, this Court "t[ook] into account not only the number of lives at risk, but also their relative culpability," and concluded that "[i]t was respondent, after all, who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice between two evils that Scott confronted." *Id.* Bryan Long's actions, likewise, forced Deputy Slaton to choose between two evils: allowing a suspect suffering from a "psychotic episode," and who posed a real and present threat of serious harm to himself or others, to escape in a stolen, performance-enhanced police cruiser with little regard for his own safety, much less the safety of others, or use deadly force to prevent the risk of harm to innocent and unknowing pedestrians and drivers a short distance away or even himself. As in *Scott*, the reasonableness of Deputy Slaton's actions is clear.

No precedent from this Court or the Eleventh Circuit supports the Petitioners' distinction between the risk of "potential danger" and the risk of "immediate danger," nor does any precedent suggest that "potential danger" is mutually exclusive of "immediate danger." Rather, as the Eleventh Circuit recognized in *Pace v. Capobianco*, "under the law, the threat of danger to be assessed is *not just the threat to officers at the moment*, but also to the officers and other persons if the chase went on." *Pace v. Capobianco*, 283 F.3d 1275, 1280 n.12 (11th Cir.2002) (emphasis added). In *Pace*, the Eleventh Circuit was

faced with the same distinction that Petitioners now assert. There, the Eleventh Circuit accepted as true the allegations that, at the time of the shooting, the suspect had neither tried to run over nor aimed the vehicle at officers. *Id.* at 1282. Ultimately, the Court concluded that officers did not use excessive force in shooting a suspect who had stopped his vehicle after a high-speed chase. *Id.*

Likewise, in *Troupe v. Sarasota County, Fla.*, 419 F.3d 1160 (11th Cir.2005), the Eleventh Circuit confirmed that no distinction exists between the risk of "potential danger" and the risk of "immediate danger." There, the suspect was in an Oldsmobile parked in a driveway when officers arrived in a SWAT vehicle and blocked the suspect's access to the main road. *Id.* at 1164. When the suspect revved the engine and moved the car forward, an officer shot him. The Eleventh Circuit recognized that the officer's use of force was reasonable because the officer "knew that citizens *could be* on the main street and *could be harmed*. Thus, Bauer believed there was an *immediate risk of harm* to the general public." *Troupe*, at 1169 n.8 (emphasis added). In holding that the officer's use of force was reasonable, the Court recognized that, when someone other than the officer "could be harmed" at an unknown time in the future should the suspect escape, the risk of harm is not a potential risk of harm; it is "an immediate risk of harm."

In the present case, the Eleventh Circuit reiterated this conclusion, holding that "the law does not

require officers in a tense and dangerous situation to wait until the moment a suspect uses a deadly weapon to act to stop the suspect." *Long*, at 581 (citing *Pace*, 283 F.3d at 1282 (concluding at the summary judgment stage that officers did not use excessive force in shooting a suspect who had stopped his vehicle after a high-speed chase – even though the court accepted that, at the time of the shooting, the suspect had neither tried to run over nor aimed the vehicle at officers); *Blanford v. Sacramento County*, 406 F.3d 1110, 1116-19 (9th Cir.2005) (concluding that officers did not use excessive force in shooting a suspect who was carrying a sword, had failed to comply with orders to drop the sword, and was attempting to enter a house that – as far as the officers knew – might or might not have been empty, even though the suspect was at all times walking *away* from the officers and did not actually threaten the officers – or anyone else – with the weapon); *Montoute v. Carr*, 114 F.3d 181, 185 (11th Cir.1997) ("[A]n officer is not required to wait until an armed and dangerous felon has drawn a bead on the officer or others before using deadly force"). Although the Petitioners attempt to distinguish these cases, they do so by mischaracterizing their facts.[7]

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[7] The Petitioners state that, in *Pace*, the suspect "turned his car toward pursuing officers." (Pet. Brief, p.9.) In *Pace*, the Court reached its conclusion "accept[ing]...as true that Davis's car, in the cul-de-sac, did not try to run over the deputies and that Davis, in the cul-de-sac, did not aim the car at the deputies." *Pace*, at 1282. Likewise, the Petitioners state that, in *Montoute*,

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B. Deputy Slaton's use of force was objectively reasonable under the fact-specific Fourth Amendment analysis required by this Court and the Eleventh Circuit.

In its opinion below, the Eleventh Circuit emphasized the following facts:

> Long was mentally unstable; and he had taken control of not just any vehicle, but a *police* cruiser. This police cruiser was marked as a Lauderdale County Sheriff's patrol car and was equipped with a flashing light bar on the roof, two police radios, and other emergency equipment. Under Alabama law, a motor vehicle is, at least, potentially a "dangerous instrument" – that is, an instrument "highly capable of causing death or serious bodily injury." ALA. CODE §13A-1-2(5). Different from other vehicles, this fully marked and fully equipped police cruiser had an even greater potential for causing – either intentionally or otherwise – death or serious bodily injury.

Long, at 581 (emphasis in original). Neither *Garner* nor *Scott* held unconstitutional the use of force to prevent a risk of danger such as the one Deputy Slaton

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the suspect was "carrying [a] sawed-off shotgun...which he had already fired." (Pet. Brief, p.9.) In *Montoute*, the Court observed that "Montoute had never turned around to face Carr and had never pointed the shotgun at anyone," and that the officer did not know that the suspect actually shot the gun. *Montoute*, at 183.

encountered.[8] As the Eleventh Circuit recognized, a Fourth Amendment reasonableness inquiry is inherently fact specific. "*Garner* says something about deadly force but not everything, especially when facts vastly different from *Garner* are presented. The Supreme Court has cautioned that '*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute "deadly force."'" *Long*, 508 F.3d at 580 (quoting *Scott*, 127 S.Ct. at 1777).

In *Brousseau*, a case much more factually similar to the circumstances faced by Deputy Slaton than *Garner*,[9] this Court explicitly acknowledged that,

> this area is one in which the result depends very much on the facts of each case. None of them squarely governs the case here; they do suggest that Brousseau's actions fell in the 'hazy border between excessive and acceptable force.' The cases by no means clearly establish that Brousseau's conduct violated the Fourth Amendment.

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[8] *Garner* dealt with the use of force on a "'young, slight, and unarmed' burglary suspect...[who] was running away on foot" and *Scott* involved the use of force on a fleeing suspect in a vehicle but it found that the use of force was reasonable. *Scott*, at 1777, 1778-79. Notably, the vehicle in *Scott* was not a fully equipped, performance-enhanced police cruiser but was a civilian vehicle. *Id.* at 1773.

[9] It is telling that the Petitioners fail to even cite, much less discuss, the most factually similar case on point that this Court has decided: *Brousseau*.

Brousseau, 543 U.S. at 200 (internal quotations and citations omitted). In other words, cases like *Brousseau* and the case at bar are, by their very nature, fact-dependent and difficult to arrange into neat principles of expected conduct.

Instead of applying a broad constitutional rule regarding the reasonableness of an officer's use of force, as the Petitioners now urge this Court to do, the Eleventh Circuit recognized the inherent factual specificity of the Fourth Amendment inquiry:

> Because "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," *Graham* [*v. Conner*], 109 S.Ct. [1865] at 1872 [(1989)] (quoting *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979)) (alteration in original), we must "slosh our way through the factbound morass of 'reasonableness.'" *Scott*, 127 S.Ct. at 1778.

Id. Petitioners now urge this Court to second-guess the decisions made by law enforcement officers in the field as to the immediacy of the risk of a potential danger, in direct contravention of the holding in *Brousseau*. To do so would undermine this Court's prior observation that "police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Graham v. Connor*, 109 S.Ct. 1872 (1989); *see also*, *Vaughan v. Cox*, 343 F.3d 1323,

1331 (11th Cir.2003) ("We are loath to second-guess the decisions made by police officers in the field.").

C. No clearly established law placed Deputy Slaton on notice that his use of force was unconstitutional.

The Petitioners cite the Eleventh Circuit's opinion in *Vaughan* as one that provides Deputy Slaton "fair notice" that his conduct was unconstitutional. (Pet. Brief, p.10.) In *Vaughan*, the Eleventh Circuit considered the constitutionality of an officer's use of deadly force to prevent escape in their truck, a civilian vehicle, on an uncongested interstate. The Court based its conclusion that the suspects did not present a risk of danger to the officers or others on the following facts:

> Based on Vaughan's version of the events, it is not clear that Cox had probable cause to believe that Looney or Cox were in immediate danger from the suspects at the time of the shooting. Nor does the record reflect that the suspects had menaced or were likely to menace others on the highway at the time of the shooting. Instead, the truck's lane was clear of traffic and Rayson made no aggressive moves to change lanes before Cox fired. Moreover, according to Vaughan, the collision between the truck and Cox's cruiser was both accidental and insufficient to cause Cox to lose control.

343 F.3d at 1330.

Vaughan does not stand for the proposition, as the Petitioners suggest, that, before an officer may use force to prevent a suspect from fleeing in a vehicle, the suspect must "first drive[ ] such a vehicle in a manner which pose[s] an imminent threat of serious harm to the officers or others." (Pet. Brief, p.10.) Rather, the Court examined the "totality of the circumstances" to conclude that, *under those circumstances*, where the officer "simply faced two suspects who were evading arrest and who had accelerated to eighty to eighty-five miles per hour in a seventy-miles-per-hour zone in an attempt to avoid capture," the officer's use of deadly force was unconstitutional. Such a holding does not set a litmus test for the use of deadly force on a fleeing suspect. Rather, it reaffirms this Court's long-standing rule that, for purposes of a Fourth Amendment objective reasonableness inquiry, "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them" and must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham* at 386, 397.

Indeed, the Eleventh Circuit applied that test to the circumstances that Deputy Slaton faced: "'[T]he question then is whether, given the circumstances, [Long] would have appeared to reasonable police officers to have been gravely dangerous.' Considering the circumstances surrounding the shooting, including the threat posed by Long's condition and behavior, this question must be answered 'yes.'" *Long*, at 581

(quoting *Pace*, 283 F.3d at 1281). The Eleventh Circuit's conclusion, necessarily, was based on the factual distinctions between the circumstances faced by Deputy Slaton and the circumstances faced by the officer in *Vaughan*. The officer in *Vaughan* was not confronted by a suspect that had been diagnosed as psychotic, who evidenced a real and present threat of substantial harm to himself or others through recent and overt acts, nor did he confront a suspect that was operating a stolen, fully equipped, and performance-enhanced police cruiser. Additionally, the pursuit of the suspect in *Vaughan* on a four- to eight-lane, uncongested interstate with a right-of-way in excess of 100 feet, limited entrances and exits and no red lights or stop signs is *less threatening* to the public than chasing the same suspect on a two-lane roadway through a densely populated area filled with residences, schools and businesses and which would have been punctuated frequently by stop signs, red lights and numerous unregulated entrances and exits. *See Magdziak v. Byrd*, 1995 WL 704394 (N.D.Ill. 1995) (discussing the comparative risks posed by pursuits carried out in expressways versus residential roadways).

The Eleventh Circuit, focusing on these factual dissimilarities, distinguished its holding in *Vaughan* from the factual circumstances Deputy Slaton confronted:

> We do not read *Vaughan* as capable of putting every objectively reasonable officer on notice that deadly force could not be used in

> the circumstances presented in this case. In *Vaughan*, this Court concluded that an officer used unreasonable force when he, without warning, discharged his firearm at suspects fleeing in a stolen truck.... The present case has, at least, three additional facts not present in *Vaughan* and that an objectively reasonable police officer could believe "might make a difference" for whether the conduct *in the present instance* would violate federal law. *See generally Marsh* [*v. Butler County*], 268 F.3d [1014] at 1032 [(11th Cir.2001)] (discussing when pre-existing precedents cannot clearly establish the applicable law). In this case, unlike *Vaughan*, the fleeing driver was in an unstable frame of mind, had taken possession of a marked police cruiser, and had been warned that deadly force would be used if he did not leave the cruiser. Therefore, we believe that the situation in *Vaughan* is too different from this case to cause every objectively reasonable officer to know that the use of deadly force in the circumstances of this case must violate federal law.

Long, at 584-85 (emphasis added). Because *Vaughan* could not have provided Deputy Slaton with "fair notice" that his conduct was unconstitutional, Deputy Slaton violated no clearly established law with his use of force.

Alternatively, the Petitioners contend that *Vaughan* provided Deputy Slaton "fair warning" that his use of force was unlawful under some "general

constitutional rule," despite the fact that "the very action in question has [not] previously been held unlawful." (Pet. Brief, p.10, quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). However, in *Brousseau*, this Court rejected a similar argument. There, the Court of Appeals acknowledged that *"Graham v. Connor, supra*, clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness." 543 U.S. at 198. In *Brousseau*, this Court reversed the Ninth Circuit Court of Appeals on the grounds that it

> proceeded to find fair warning in the general tests set out in *Graham* and *Garner*. 339 F.3d, at 873-874. In so doing, it was mistaken. *Graham* and *Garner*, following the lead of the Fourth Amendment's text, are cast at a high level of generality. See *Graham v. Connor, supra*, at 396 [ ] ("'[T]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application'"). Of course, in an obvious case, these standards can "clearly establish" the answer, even without a body of relevant case law. See *Hope v. Pelzer*, 536 U.S. 730, 738, [ ] (2002) (noting in a case where the Eighth Amendment violation was "obvious" that there need not be a materially similar case for the right to be clearly established). See also *Pace v. Capobianco*, 283 F.3d 1275, 1283 (11th Cir.2002) (explaining in a Fourth Amendment case involving an officer shooting a fleeing suspect in a vehicle that,

> "when we look at decisions such as *Garner* and *Graham*, we see some tests to guide us in determining the law in many different kinds of circumstances; but we do not see the kind of clear law (clear answers) that would apply" to the situation at hand). The present case is far from the obvious one where *Graham* and *Garner* alone offer a basis for decision.

Id. at 599.

The Petitioners advance the same argument that this Court rejected in *Brousseau*: that the "general constitutional rule" in *Graham* and *Garner* provided Deputy Slaton with fair notice that his use of force was unconstitutional. In *Brousseau*, the Court examined "whether, at the time of Brosseau's actions, it was '"'clearly established'"' in this more '"particularized"' sense that [the officer] was violating Haugen's Fourth Amendment right[s]." *Id.* at 199. After examining the cases that could have put the officer on notice that her use of force was unconstitutional, this Court concluded that all the "cases taken together undoubtedly show that this area is one in which the result depends very much on the facts of each case. None of them squarely governs the case here; they do suggest that Brosseau's actions fell in the '"hazy border between excessive and acceptable force."'" *Id.* at 201 (quoting *Saucier v. Katz*, 533 U.S. 194, 206 (2001)). As with *Brousseau*, the circumstances of this case render it "far from the obvious one where *Graham* and *Garner* alone offer a basis for decision." *Id.* Further, the Petitioners have cited no clearly established law

that would transform this case from one that straddles the "hazy border between excessive and acceptable force" to an "obvious clarity" case. *Id.*

II. THE ELEVENTH CIRCUIT'S DECISION CREATES NO CIRCUIT SPLIT.

The Petitioners contend that the Eleventh Circuit's decision creates a split among the Circuits in Fourth Amendment jurisprudence. The Petitioners argue that the Eleventh Circuit decision "conflicts with the law in other Circuits, which determine[s] reasonableness based upon the threat to the officer or others at the time of the shooting." (Pet. Brief, p.11.) In support of this argument, the Petitioners cite cases from the Third Circuit, the Sixth Circuit, and the Seventh Circuit. None of the cited cases squarely addresses the distinction between the risk of "potential danger" and the risk of "immediate danger" for purposes of a Fourth Amendment objective reasonableness inquiry. Even if this Court recognizes such a distinction and disagrees with the Eleventh Circuit's holding in light of that distinction, the Eleventh Circuit's decision does not conflict with any decisions of these or any other Circuits.

The primary case the Petitioners rely on to show conflict between the Eleventh Circuit's decision and other Circuits is *Smith v. Cupp*, 430 F.3d 766 (6th Cir.2005). There, the Sixth Circuit held unconstitutional an officer's use of lethal force to stop a fleeing suspect who had stolen his police cruiser. The facts

relied upon by the Sixth Circuit were that "Dunn shot Smith after the police cruiser was past Dunn and there was no immediate danger to anyone in the vicinity. Dunn's use of force was made even more unreasonable by the fact that Smith had been cooperative up to this point, and was arrested for the nonviolent offense of making harassing phone calls." *Id.* at 773. Although the Court recognized that "there was some danger to the public from Smith's driving off in a stolen police car," it ultimately held that the "absence of any *Garner* preconditions to the use of deadly force makes this an 'obvious' case" was sufficient to deny the officer qualified immunity. *Id.* at 773, 776. In reaching this conclusion, the Sixth Circuit relied heavily on the factual circumstances that the officer confronted in determining that "[a]lthough Smith had possession of a dangerous 'weapon,' he was not threatening the lives of those around him with it when he was fatally shot." *Id.* at 775.

Despite the fact that the suspect in *Smith* stole a police cruiser, the similarities between the circumstances faced by the officer in *Smith* and those faced by Deputy Slaton are negligible. The Sixth Circuit's finding of a constitutional violation had little to do with the fact that the suspect stole a police cruiser but focused, instead, on *what an objectively reasonable officer would have thought the suspect would do with the stolen cruiser*. The Sixth Circuit observed that "Smith and Dunn never struggled, Smith never displayed any violent tendencies, and the[se] facts support a finding that a reasonable officer in Dunn's

position would not have perceived danger to anyone at the scene." *Smith* at 766. Instead of perceiving a threat of danger, a reasonable officer, under these circumstances, would have perceived "a scene where Smith was merely trying to flee in the cruiser and Dunn purposefully shot Smith under circumstances of no threat to Dunn or others." *Id.* at 770. These facts do not suggest that the suspect would, intentionally or otherwise, cause death or serious bodily injury to the officer or others.

However, these same facts that suggest the suspect in *Smith* presented no risk of danger to the officer or others are readily distinguishable from the circumstances Deputy Slaton faced. Bryan Long was in the midst of a "psychotic episode," and his condition, his father, a physician, believed rendered Long "a real and present threat of substantial harm to [him]self and/or others" as "evidenced through recent and overt acts";[10] Long had resisted Deputy Slaton's efforts to handcuff him; Long had commandeered a fully equipped, performance-enhanced police cruiser;

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[10] The Petitioners attempt to analogize the mental state of the suspect in *Smith* with that of Bryan Long. However, it does not follow that the risk of harm from a suspect operating a stolen police cruiser while he is believed "to be somewhat impaired" by alcohol consumption is tantamount to the risk of harm from a suspect operating a stolen police cruiser that is, in fact, suffering from a "psychotic episode," who is by definition "a real and present threat of substantial harm" to himself or others as evidenced through recent and overt acts. *Lynch*; ALA. CODE §22-52-10.4(a).

and, Long had ignored Deputy Slaton's clear order to get out of the cruiser under threat of deadly force.[11] A psychotic suspect who had stolen a performance-enhanced police cruiser in the officer's presence and ignored a clear order to get out of the cruiser as the officer trained his weapon on him can hardly be described as "non-dangerous." Rather, Long's blatant disregard of his own life, as he ignored the lawful order of a law enforcement officer, gave Deputy Slaton reason to believe that Bryan Long would continue to risk his own life, or the lives of others, in further disregard of the law. Nothing in Long's actions suggested that, once he escaped in a performance-enhanced police cruiser, he would somehow transform into a law-abiding citizen who would observe the rules of the road and cautiously avoid any risk of harm to pedestrians or other drivers that he encountered on the road.[12]

The Eleventh Circuit noted "the obvious: Long could have quickly shifted gears and accelerated towards Deputy Slaton at any time. An objectively reasonable officer would have known this fact." *Long*, at 581 n.7. The Court further acknowledged that "[e]ven if we accept that the threat posed by Long to

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[11] The officer in *Smith* did not give any warning before he used deadly force. *Smith*, 430 F.3d at 770.

[12] Even if Deputy Slaton had been able to pursue the stolen performance-enhanced police cruiser, Long's behavior in no way indicated that he would abide by an officer's orders to stop the vehicle at some later time.

Deputy Slaton was not immediate in that the cruiser was not moving toward Slaton when shots were fired.... Long's unstable frame of mind, energetic evasion of the deputy's physical control, Long's criminal act of stealing a police cruiser, and Long's starting to drive – even after being warned of deadly force – to a public road gave the deputy reason to believe that Long was dangerous." *Id.* at 581-82. Accordingly, the Eleventh Circuit concluded that, under the specific circumstances that confronted Deputy Slaton, Bryan Long presented a "risk [of harm] that is not remote," from which Deputy Slaton had a legitimate "government interest" in "protecting the innocent public."[13] *Id.* at 582.

Despite the Eleventh Circuit's conclusion that Bryan Long presented a risk of harm that was not remote, the Petitioners, again, raise the false dichotomy between the risk of "potential danger" and the risk of "immediate danger." The Petitioners claim that "the Sixth Circuit assessed the threat at the time of the shooting as opposed to a potential future threat." (Pet. Brief, p.13.) Although the Sixth Circuit did conclude that, under the factual circumstances

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[13] The Petitioners have ignored the Eleventh Circuit's conclusion that Bryan Long presented a "risk [of harm] that is not remote," because they argue before this Court that "[b]y focusing only on speculative future dangers Long might have posed to others – and *by disregarding, if not conceding, that Bryan posed no immediate danger* – the Eleventh Circuit's decision directly contradicts the Supreme Court's decisions in *Scott* and *Garner*." (Pet. Brief, p.8, emphasis added.)

then present, "there was no immediate danger to anyone in the vicinity," the Court did not consider the constitutionality of the officer's conduct in light of any risk of potential harm.[14] 430 F.3d at 773. However, at no point in its analysis did the Sixth Circuit recognize a distinction between a risk of "potential danger" and a risk of "immediate danger," and its holding certainly did not hinge on any such distinction. Rather, its holding was based on a lack of "evidence that Dunn had cause to believe that Smith posed an immediate risk of death or serious danger to Dunn, Rutherford, or nearby citizens."[15] *Id.* at 776. Absent any distinction between a risk of "potential danger" and a risk of "immediate danger," semantics notwithstanding, the Sixth Circuit's decision in *Smith* does not conflict with the Eleventh Circuit's decision in this case. The mere fact that the Sixth Circuit reached a different conclusion regarding the objective reasonableness of an officer's conduct in factual circumstances vastly different from those that Deputy

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[14] Despite the Petitioners' implications to the contrary, the Sixth Circuit's determination that the officer's use of force was unconstitutional absent a risk of "immediate harm" is not tantamount to holding that any risk of "potential harm" is insufficient to render the officer's conduct constitutional.

[15] Had the evidence shown that the suspect in *Smith* was a real and present threat of substantial harm to himself or others as evidenced through recent and overt acts, the Sixth Circuit would likely have reached a different conclusion.

Slaton confronted does not, alone, create a Circuit split.[16]

The Petitioners also cite *Abraham v. Raso*, 183 F.3d 279 (3rd Cir.1999), and *Sigley v. Parma Heights*, 437 F.3d 527 (6th Cir.2006), in an effort to establish a Circuit split regarding the purported distinction between a risk of "potential danger" and a risk of "immediate danger."[17] (Pet. Brief, pp.13-14.) In *Abraham*,

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[16] This Court has granted petitions for writ of certiorari to resolve Circuit splits on diverging conclusions of law, not applications of law to fact. *See, e.g., Concrete Works of Colorado, Inc. v. City and County of Denver, Colo.*, 124 S.Ct. 556, 560, (2003) ("the case is worthy of the Court's review because it presents a clear Circuit split on the standard of appellate review for the 'strong basis in evidence' requirement"); *Dooley v. Korean Air Lines Co., Ltd.*, 524 U.S. 116, 121 (1998) ("We granted certiorari...to resolve a Circuit split concerning the availability of a general maritime survival action in cases of death on the high seas"); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 532 (1995) ("We granted certiorari...to resolve a Circuit split on the enforceability of foreign arbitration clauses in maritime bills of lading"); *City of Milwaukee v. Cement Div., Nat. Gypsum Co.*, 515 U.S. 189, 193-94 (1995) ("The Court of Appeals' decision deepened an existing Circuit split regarding the criteria for denying prejudgment interest in maritime collision cases"); *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 251 (1989) ("[T]he District Courts and Courts of Appeals set out "to develop a meaningful concept of 'pattern,'"...and promptly produced the widest and most persistent Circuit split on an issue of federal law in recent memory") (Scalia, J., concurring).

[17] Although the Petitioners cite *Tubar v. Clift*, 453 F.Supp.2d 1252 (W.D.Wash. 2006), that case was not decided by a Circuit Court of Appeals and could not contribute to any Circuit split. The Petitioners also cite *Estate of Starks v. Enyart*,

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after an extensive analysis of the disputed and undisputed facts,[18] the Third Circuit held that "the undisputed facts are that Abraham had stolen some clothing, resisted arrest, hit or bumped into a car, and was reasonably believed to be intoxicated. Given these facts, a jury could quite reasonably conclude that Abraham did not pose a risk of death or serious bodily injury to others and that Raso could not reasonably believe that he did." *Abraham* at 293. In *Sigley*, the Sixth Circuit, likewise, conducted an extensive analysis of the disputed and undisputed facts,[19] and held that "[t]he conflicting views of the

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5 F.3d 230 (7th Cir.1993), but, there, the Seventh Circuit did not even reach a conclusion about the constitutionality of the officer's actions, but dismissed the appeal for lack of jurisdiction. *Enyart*, 5 F.3d at 234. That holding cannot possibly conflict with the Eleventh Circuit's decision in this case.

[18] The Third Circuit based its reversal of the District Court's qualified immunity analysis on the District Court's failure to properly construe the facts. *See Abraham*, 183 F.3d at 292 ("When the District Court found that Abraham posed a significant threat of death or serious physical injury to others, it emphasized the violence of Abraham's efforts to flee. In doing so, the District Court did not read the evidence in the light most favorable to the estate and failed to rely on the estate's version of events where there were genuine factual disputes").

[19] The Sixth Circuit, like the Third Circuit in *Abraham*, based its reversal of the District Court's qualified immunity analysis on the District Court's failure to properly construe the facts. *See Sigley*, 437 F.3d at 536 ("Viewing the evidence in a light most favorable to the Plaintiff, these are disputed factual issues that preclude the granting of summary judgment. *See Sova* [*v. City of Mt. Pleasant*], 142 F.3d [898] at 903 [(6th Cir.1998)] (holding that where there are contentious factual disputes relating to the reasonableness of an officer's use of

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facts demonstrate that there are unresolved factual issues regarding whether Mockler was chasing after Davis' car or the car was turning into him when he fired" and accordingly, "it is not clear whether Mockler had probable cause to believe that Davis posed a significant threat of death or serious physical injury to others." *Sigley*, 437 F.3d at 536.

Neither of these cases recognizes any distinction between a risk of "potential danger" and a risk of "immediate danger," nor are their holdings premised on such a distinction. Rather, like *Smith*, their holdings are premised on the objective reasonableness of an officer's use of force in light of the specific factual circumstances he confronted. Further, like *Smith*, both of these cases were decided at the summary judgment stage, and their holdings are premised on the failure of the district court to properly construe disputed facts.

In the present case, the Eleventh Circuit had no disputed facts to construe, because the claims were adjudicated on a motion to dismiss. The facts that the Eleventh Circuit relied upon in this case were conceded by the Plaintiff: that Bryan Long was in the middle of a "psychotic episode," which by definition rendered Long "a real and present threat of substantial harm to [him]self or others" as "evidenced through recent and overt acts"; that Long had resisted Deputy

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deadly force, the court is precluded from granting summary judgment for officers who shot Plaintiff's son)").

Slaton's efforts to handcuff him; that Long had commandeered a performance-enhanced police cruiser; and, that Long had ignored Deputy Slaton's clear order to get out of the cruiser under threat of deadly force. Unlike either *Abraham* or *Sigley*, the Eleventh Circuit could determine from these undisputed facts that Deputy Slaton's use of force "was not outside the range of reasonableness in the light of the potential danger posed to officers and to the public if Long was allowed to flee in a stolen police cruiser." *Long*, 508 F.3d at 581. The mere fact that these Circuits reached different conclusions under vastly different factual circumstances at different stages of litigation does not create a Circuit split.

Finally, even if this Court were to accept the Petitioners' arguments that a Circuit split exists between the Eleventh Circuit's reasoning in this case the other circuit decisions cited by the Petitioners, the split has already been resolved. The Eleventh Circuit decided this case after *Scott*, and, in fact, relied upon this Court's decision there. Addressing the argument whether the police should have simply let the suspect escape, this Court stated in *Scott* "[w]e think the police need not have taken that chance and hoped for the best." *Scott*, 127 S.Ct. at 1778. The Petitioners contend that the cases they have cited, *Smith*, *Sigley*, and *Starks*, counsel the opposite conclusion this Court reached in *Scott*: that an officer must allow the suspect to escape and "hope for the

best" where the threat of danger is not impending or "immediate," but is nevertheless "potential."[20] The Eleventh Circuit, on the other hand, followed this Court's reasoning in *Scott* and concluded that Deputy Slaton did not have to let Long go and "hope" he did not seriously injure or kill someone with a stolen police cruiser, because that threat of danger was, indeed real and present.[21] *Long*, 508 F.3d at 583 (quoting *Scott*, 127 S.Ct. at 1778). To the extent any split exists between the Eleventh Circuit's decision and the pre-*Scott* cases cited by the Petitioner, the split has already been resolved by this Court in *Scott*.

III. THE ELEVENTH CIRCUIT'S DECISION DOES NOT VIOLATE PUBLIC POLICY.

The Petitioners contend that, under the Eleventh Circuit's decision, "a reasonable officer may well conclude...that he may employ lethal force against any suspect who *appears* mentally unstable and is fleeing in an automobile, *regardless of whether the suspect poses an immediate risk of serious danger to others*." (Pet. Brief, pp.14-15, emphasis added.) This

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[20] It is not surprising that these cases, as interpreted by the Petitioner, reach an opposite conclusion that this Court reached in *Scott*; they all pre-date this Court's decision in *Scott*.

[21] The Eleventh Circuit's holding cannot be construed, as the Petitioners might suggest, that an officer may use deadly force to prevent a "speculative" threat of danger; the threat of danger recognized by the Eleventh Circuit was a real and present danger.

oversimplification of the Eleventh Circuit's decision mischaracterizes the basis for that decision and conflates the risk of danger posed by a "mentally ill fleeing suspect" and the risk of danger posed by a fleeing suspect who is "mentally ill" *and* "poses a real and present threat of substantial harm to himself or others" as "evidenced by a recent overt act." *Compare* Pet. Brief, pp.14-15 *with* ALA. CODE §22-52-10.4(a). The Eleventh Circuit based its conclusion that Deputy Slaton's use of force was reasonable on the fact that Deputy Slaton *actually knew*, rather than assumed, that Bryan Long was suffering from a psychotic episode and was determined by a medical doctor to be committable. Because Long could have been detained, pending a commitment hearing, Deputy Slaton had *actual probable cause to believe* that Long was "a real and present threat of substantial harm to [him]self or others" as "evidenced through recent and overt acts." That knowledge, combined with the fact that Long had resisted Deputy Slaton's efforts to handcuff him; that Long commandeered a fully equipped, performance-enhanced police cruiser; and, that Long ignored Deputy Slaton's clear order to get out of the cruiser under threat of deadly force, created an objective risk of danger to Deputy Slaton, or to the general public at large. The Fourth Amendment does not require that Deputy Slaton, under the circumstances he confronted, to let Long go and "hope for the best."[22]

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[22] The real public policy implications of this case would arise in a conclusion contrary to the one reached by the Eleventh

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CONCLUSION

Based on the foregoing, Respondents Jimmie Ray Slaton, Jr. and Ronnie Willis respectfully request that this Court deny the Petition for Writ of Certiorari and affirm the decision of the Eleventh Circuit Court of Appeals.

Respectfully submitted this the 27th day of October, 2008.

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Circuit. What would be the implication of holding that an officer *must* permit the escape of a suspect in the midst of a "psychotic episode," who poses a real and present threat of substantial harm to himself or others, after he resists arrest and commandeers a performance-enhanced police cruiser, despite clear and direct orders to get out of the cruiser under threat of deadly force? The Eleventh Circuit considered that question in its analysis of the Fourth Amendment issues in this case. *See Long*, at 582-83 (citing *Scott*, 127 S.Ct. at 1778, and *fifteen* other cases for the proposition that "[p]rotecting the innocent public from risks that are not remote is a government interest").